

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN SMEEKS)	
Claimant)	
VS.)	
)	Docket No. 258,382
WAL-MART)	
Respondent)	
Self-Insured)	

ORDER

The respondent requested review of the July 27, 2001 Order entered by Administrative Law Judge Pamela J. Fuller on claimant's pre-award request for penalties. The Appeals Board (Board) heard oral argument on April 16, 2002.

Appearances

Claimant appeared by her attorney, Scott J. Mann of Hutchinson, Kansas. The respondent appeared by its attorney, R. Todd King of Wichita, Kansas.

Record and Stipulations

The Board considered the pleadings, hearing transcripts and exhibits contained in the official file of the Division of Workers Compensation including the transcript of the July 18, 2001 hearing on claimant's Application for Penalties. During the oral argument to the Board, counsel for the parties stipulated that this claim has now been settled and that all issues were resolved except the July 27, 2001 award for penalties and attorney fees. Counsel for the parties further stipulated that on August 20, 2001, counsel for claimant received a check from respondent dated August 16, 2001 in the full amount of the attorney fees awarded.

Issues

The Administrative Law Judge (ALJ) entered a preliminary hearing Order in this proceeding on March 14, 2001, granting claimant temporary total disability compensation. Claimant served Demand for Payment of Benefits upon respondent on March 22, 2001. When the respondent failed to make payment, claimant sought penalties. By Order dated July 27, 2001, the ALJ ordered respondent to pay penalties and attorney fees. On August 6, 2001, respondent sought this review. On August 16, 2001 claimant's attorney fees were paid by respondent. In its Application for Board of Appeals Review, the respondent requested review of two (2) specific issues:

- (1) Whether the ALJ exceeded her authority in ordering penalties; and
- (2) Whether the ALJ exceeded her authority in ordering respondent to pay claimant's attorney fees.

In its brief and during oral argument to the Board, counsel for respondent clarified that the only issue for review was the ALJ's authority to award attorney fees in a proceeding conducted pre-award.

Because the respondent paid the attorney fees ordered by the ALJ, the claimant contends the issue is now moot.

Findings of Fact and Conclusions of Law

After reviewing the entire record, the Board finds that it is without jurisdiction to hear this appeal and respondent's Application for Board of Appeals Review should be dismissed.

The respondent had the right to withhold payment of the attorney fees pending review of the July 27, 2001 Order. Payment of the attorney fees is acquiescence to the Order and the respondent may not, thereafter, adopt an inconsistent position and request a review of that Order. Respondent waived its right of appeal by acquiescing in the judgment. See Labette Community College v. Board of Crawford County Comm'rs, 258 Kan. 622, 907 P.2d 127 (1995); McDaniel v. Jones, 235 Kan. 93, 679 P.2d 682 (1984); and Brown v. Combines Ins. Co. of America, 226 Kan. 223, 597 P.2d 1080 (1979). See also, Clark v. Food Barn, WCAB Docket No. 166,431 (December 1995).

The gist of acquiescence sufficient to cutoff the right to appeal is voluntary compliance with the judgment. Herein it was undisputed the appeal was filed and then an

adjustor mistakenly paid the ordered attorney fees. This raises the issue whether such mistaken or negligent payment is voluntary.

In Gehring v. Goering, 181 Kan. 994, 317 P.2d 424 (1957) the Court cited with approval the case of Bank v. Bracey, 112 Kan. 677, 212 P. 695 (1923) where, after an appeal was taken, a bank cashier paid the ordered costs without knowledge of the consequence of payment and where the board of directors had no intention of abandoning the appeal. Nonetheless, such payment was considered voluntary acquiescence regardless of the mistaken payment and ignorance of the payment's effect. Accordingly, the fact that the payment was mistakenly made is not controlling.

WHEREFORE, it is the finding, decision and order of the Appeals Board that this review should be, and hereby is, dismissed.

IT IS SO ORDERED.

Dated this _____ day of April 2002

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Respondent
Scott J. Mann, Attorney for Claimant
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

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